SUPREME COURT, U. S.
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 343

HARRY T. MALTBY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Harry T. Maltby, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above entitled case, dismissing the plaintiff's complaint, entered on February 3, 1967, and the denial of the plaintiff's motion for rehearing and reconsideration by order dated April 14, 1967, and entered on that day.

OPINIONS BELOW

The judgment and order above described were entered without opinion, and are unreported. They are found at pages 38 and 51 of the Record, and are as follows:

"IN THE UNITED STATES COURT OF CLAIMS

No. 189-66

Harry T. Maltby

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON AND NICHOLS, Judges.

ORDER

This case comes before the court on defendant's motion to dismiss plaintiff's petition. Upon consideration thereof, together with the opposition thereto, and without oral argument, it is concluded that plaintiff's alleged claim is barred by the statute of limitations, 28 U.S.C., Sec. 2501, for failure to commence a timely action in this court, and

IT IS ORDERED that defendant's motion to dismiss plaintiff's petition be and the same is granted and the petition is dismissed.

By the Court
Wilson Cowen
Chief Judge"

"IN THE UNITED STATES COURT OF CLAIMS

35-66 BERNARD ZIMBERG)
) v. THE UNITED STATES
189-66 HARRY T. MALTBY)

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

These cases come before the court on motions or requests for relief from an order, for rehearing, reconsideration, and further relief under Rules 68 and 69 of the Rules of this Court and, on consideration thereof,

IT IS ORDERED this 14th day of April, 1967, that said motions be and the same are denied as follows:

35-66 Bernard Zimberg. Plaintiff's request for relief from an order of this court.

189-66 Harry T. Maltby. Plaintiff's motion for re-hearing and consideration.

By the Court
Wilson Cowen,
Chief Judge"

JURISDICTION

The jurisdiction of the Court of Claims was invoked under 28 U.S.C. 1346(a)(2) and 28 U.S.C. 1491 by reason of the fact that this is an action against the United States. The jurisdiction of this court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims decided a federal question in a way in conflict with the applicable decisions of this Court (by granting summary judgment against the plaintiff, who had alleged facts to show tolling of the statutes of limitation by the acts of the defendant misleading him, such grant of summary judgment being contrary to the rulings of *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed. 2d 770).

2. Where plaintiff specifically alleges he was misled by specified acts and documents of the defendant into permitting a statute of limitations to run on his claim, is it error for the Court of Claims to grant defendant's motion to dismiss without allowing plaintiff any opportunity to produce facts and evidence to support his claims? (Held error in *Glus* v. *Brooklyn Eastern Terminal,* supra; and in *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F.2d 253, Cert. Den. 70 S. Ct. 621, 339 U.S. 919, 94 L. Ed. 1343; 190 F.2d 935; 202 F.2d 84).

3. Whether a suit for overtime wages by a government employee is controlled by the 10 year statute of limitations in 31 U.S.C. 71a, or the 6 year statute of limitations in 28 U.S.C. 2501 (an important question of federal law which has not been, but should be, decided by this Court).

4. Where plaintiff has filed a claim for administrative action with the General Accounting Office under 31 U.S.C. 71, and has sued in the Court of Claims and moved therein for suspension of proceedings pending administrative action in the General Accounting office, is it error to deny the motion for suspension before any action is taken by GAO?

STATUTES INVOLVED

28 U.S.C. 2501. Time for filing suit.

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. . . .

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

31 U.S.C. 71. Public accounts to be settled in General Accounting Office.

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

31 U.S.C. 71a. Same; Limitation of time on claims and demands.

(1) Every claim or demand (except a claim or demand by any State, Territory, possession or the District of Columbia) against the United States cognizable by the General Accounting Office under Sections 71 and 236 of this title shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within ten full years after the date such claim first accrued: PROVIDED, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within

five years after its accrual, such claim may be presented within five years after peace is established.

(2) Whenever any claim barred by subsection (1) of this section shall be received in the General Accounting Office, it shall be returned to the claimant, with a copy of this section, and such action shall be a complete response without further communication.

STATEMENT

This is an action by a retired Game Management Agent of the Department of the Interior, Fish and Wildlife Service, for overtime pay due him under the Federal Employees' Pay Act of 1945 (5 U.S.C. 911 to 926, inclusive). Defendant moved to dismiss the petition, alleging that it was barred by 28 U.S.C. 2501, a six year statute of limitations applicable to the Court of Claims. Plaintiff thereupon, by leave of court, amended his complaint, alleging that the defendant had actively misled the plaintiff into believing that he had ten years in which to file his claim, and into believing that the claim must be filed with the General Accounting Office, and into believing that filing the claim with the General Accounting Office was all that was required to preserve his rights, and that plaintiff in good faith relied on such representations. The amendment to the complaint set out specific instructions in Government manuals, and specific correspondence from the General Accounting Office and from the employing agency (The Fish and Wildlife Service), all of which, he asserted, misled him into believing that filing his claim within ten years with the General Accounting Office protected his rights.

The plaintiff claims (1) that the Government is estopped from setting up the six year statute of limitations

by reason of its own acts, which actively misled the plaintiff into believing that his rights were protected by filing the claim with the GAO within ten years, citing *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 3 L. Ed. 2d 770, 79 S. Ct. 760, and *Scarborough* v. *Atlantic Coastline R. R. Co.*, (C.A. 4, V.A.) 190 F.2d 935, Cert. Den. 70 S. Ct. 621, 339 U.S. 919, 94 L. Ed. 1343; (2) that the ten year statute of limitations found in 31 U.S.C. 71a, relating to the filing of claims with the General Accounting Office, governs this case rather than the six year statute of limitations in 28 U.S.C. 2501; (3) that the Court of Claims erred in granting the motion to dismiss, without permitting the plaintiff any opportunity whatever to prove his allegations in support of the claims of estoppel and waiver, thereby violating the ruling of this Court in *Glus* v. *Brooklyn Eastern District Terminal*, supra; (4) that the Court of Claims erred in denying the plaintiff's motion to suspend judicial proceedings until administrative proceedings in the General Accounting Office were completed.

Plaintiff moved for suspension of judicial proceedings pending the administrative proceedings in the Court of Claims, and his motion for suspension was denied by the Commissioner. The denial was asserted as error in the plaintiff's motion for rehearing and reconsideration, which the full Court denied as stated above.

If the six year statute (28 U.S.C. 2501) applies, and is not tolled, then the claim of the plaintiff is outlawed; but if the six year statute is tolled, or if the ten year statute (31 U.S.C. 71a) applies, it is not outlawed. No decision of this Court has determined which statute is applicable.

ARGUMENT

POINT I. In *Glus* v. *Brooklyn Eastern Terminal,* supra, this Court reversed the lower Court which had dismissed an action in which the plaintiff claimed the statute of limitations was tolled by representations of the defendant that the plaintiff had seven years in which to sue. The lower Court had dismissed the action on the ground that the statute of limitations had run, and that misrepresentations by the defendant did not toll the statute.

This case is identical on the facts with the instant case, and yet the Court of Claims has ignored the ruling of this Court in the Glus case and has done precisely what this Court said the lower Court could not do in the Glus case—namely, dismiss a complaint which alleges facts as to misrepresentations sufficient to toll the statute of limitations.

Another case in point arriving at the same result as the Glus case is *Scarborough* v. *Atlantic Coastline R. R. Co.*, 178 F.2d 253, Cert. Den. 70 S. Ct. 621, 339 U.S. 919, 94 L. Ed. 1343; 190 F.2d 935; 202 F.2d 84.

Plaintiff respectfully represents that he is entitled to his day in Court and an opportunity to prove that the Government did in fact misrepresent the state of the law to him, and that he relied upon such misrepresentations, and as a result allowed the six year statute of limitations to pass by.

As this Court succinctly said in the Glus case,

> "To decide the case we need look no further than the maxim that no man may take advantage of his

> own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

It is immaterial that the misrepresentation related to a matter of law, rather than fact. *Glus*, supra.

It is not necessary to allege or prove actual or intentional fraud. *Scarborough* v. *Atlantic Coastline R. R. Co.*, 202 F.2d 84.

So far as tolling of statutes of limitation is involved, the Government is to be treated like any other litigant. *Northern Metal Co.* v. *U. S.*, 350 F.2d 833.

POINT II. The Court of Claims, by dismissing the action without an opportunity to the plaintiff to present any evidence in support of his claim of waiver and estoppel, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Without a hearing, without an opportunity to present any factual evidence, the Court of Claims disposed of an issue of fact, namely, whether the defendant so conducted itself as to mislead the plaintiff into letting a statute of limitations run, thereby tolling the statute. This precise question has been decided in *Scarborough* v. *Atlantic Coastline Railway Co.*, supra, and *Glus* v. *Brooklyn Eastern Terminal*, supra. In both cases the Court reversed the action of the lower Court, which had dismissed the petition or granted summary judgment against the plaintiff, holding that such dismissal or summary judgment was error. This Court should do the same here. In both cases it was held that the plaintiff was entitled to an opportunity to prove his allegations of acts which would toll the statute. The plaintiff in this case is entitled to the same opportunity.

POINT III. The Court of Claims erred in holding (as it must have held, since it was the only issue raised by the Government in support of its motion) that the provisions of 28 U.S.C. 2501 prevail over the provisions of 31 U.S.C. 71a, and the Court should have held that compliance with the provisions of 31 U.S.C. 71a is sufficient to preserve the rights of the plaintiff. This question has been argued extensively in the plaintiff's brief in opposition to the motion to dismiss, at pp. 13-25, inclusive, of the certified transcript herein, and we will not re-argue it at length, but will content ourselves with stating the basic contentions of the plaintiff, which are: (1) That the plain language of Section 71 and Section 71a of Title 31, U.S.C., is mandatory; (2) If the language is mandatory, then the six year statute of limitations runs only from the date of filing with the GAO, or from the disposition of the claim by GAO (in either of which cases the motion to dismiss was improperly granted); (3) That this interpretation is supported by applicable case law, e.g., *United States* v. *Standard Accident Insurance Company,* 280 F.2d 445, 83 A.L.R. 2d 759; *Skinner and Eddy Corporation* v. *McCarl,* 275 U.S. 1, 72 L. Ed. 133, 48 S. Ct. 13, and *Thomson* v. *United States,* 79 Ct. of Claims 224, 226-7; (4) That the cases upon which the Government relies are either cases where the specific question was specifically exempted from consideration, or was not raised, or the statements of the Court are dicta; (5) That there has been no authoritative interpretation of the effect of 31 U.S.C. 71a, and this is a question of federal law which has not been, but should be, settled by this Court.

POINT IV. The plaintiff moved for the suspension of judicial proceedings pending administrative action in the General Accounting Office, consistently with his contention that the General Accounting Office had jurisdiction of the claim under the provisions of 31 U.S.C. 71. The

Commissioner of the Court of Claims denied the motion for suspension of judicial proceedings, and proceeded to determine the case on the motion to dismiss.

The plaintiff's motion to suspend was based on the teachings of the Courts of Appeal and of the Court of Claims itself in cases where administrative proceedings may be prolonged and a so-called "protective appeal" is necessary in order to prevent the running of any statute of limitations while the administrative procedure is in process. The decisions which show the way out of the impasse include *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 567, 568, 66 S. Ct. 322, 90 L. Ed. 318; *Friedman et al.* v. *United States*, 159 Ct. of Claims 1; *Odell* v. *United States*, 134 Ct. of Claims 643.

The plaintiff did just what these cases taught him to do—move for a suspension of the judicial proceedings pending action in the administrative agency. The petition was denied by the Commissioner, and the denial was upheld by the Court after the matter was raised in the motion for rehearing.

Plaintiff respectfully represents that the Court erred in refusing to suspend its proceedings while the plaintiff's remedy in the Court of Claims was being pursued.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Mandan, North Dakota
ROBERT VOGEL

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 343

HARRY T. MALTBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner, a former employee of the Fish and Wildlife Service of the Department of Agriculture, seeks review of an order of the Court of Claims dismissing his action for additional salary and wages for overtime, holiday and night work. This work was allegedly performed from January 1, 1955, to September 30, 1956. Petitioner filed a claim with the General Accounting Office on January 20, 1965, and filed his petition in the Court of Claims on June 13, 1965. Petitioner subsequently amended his petition

in the Court of Claims to allege that the Government had actively misled him into believing that he had ten years in which to file his claim; the earliest misrepresentation alleged was contained in a letter dated April 24, 1964 (par. VII(7) of the Court of Claims petition, as amended).

The Court of Claims granted the government's motion to dismiss on the basis of 28 U.S.C. 2501. That provision bars "[e]very claim of which the Court of Claims has jurisdiction * * * unless the petition thereon is filed, within six years after such claim first accrues."

2. The decision below is clearly correct. The ten-year limitation urged by petitioner, found in 31 U.S.C. 71a(1), is by its terms applicable only to claims filed with the General Accounting Office.[1] There is neither reason nor authority for substituting this limitation for the six-year limitation found in 28 U.S.C. 2501, which specifically applies to every claim within the jurisdiction of the Court of Claims. There is, of course, no bar to the consideration of a claim by the General Accounting Office after it has been time-barred in the courts. *Marr* v. *United States*, 106 F. Supp. 204 (Ct. Cl.), certiorari denied, 345 U.S. 956.

Petitioner alternatively claims that, if Section 2501 is applicable, misrepresentations by the govern-

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[1] "Every claim or demand * * * against the United States cognizable by the General Accounting Office * * * shall be forever barred unless such claim * * * shall be received in said office within ten full years after the date such claim first accrued * * *."

ment tolled the running of limitations. However, none of the misrepresentations are alleged to have occurred within six years of September 30, 1956, the end of the period in which the work in question was performed. Therefore, petitioner's estoppel or waiver theories are inapplicable, since the statute had already run when the statements were supposedly made. Furthermore, it is well settled that the government may not be estopped by the representations of its employees. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380. And, since the limitation period affects the jurisdiction of the Court of Claims, it may not be waived. *Munro* v. *United States*, 303 U.S. 36, 41; *Finn* v. *United States*, 123 U.S. 227, 233.

Petitioner also apparently contends that an administrative proceeding is a prerequisite to a suit in the Court of Claims, so that his cause of action did not accrue until the final determination by the General Accounting Office. Cf. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503. However, the filing of a claim with the General Accounting Office has never been considered a prerequisite to a judicial action against the government. *St. Louis, B. & M. Ry.* v. *United States*, 268 U.S. 169, 173; *Burich* v. *United States*, 366 F. 2d 984, 986-987 (Ct. Cl.), pending on petition for certiorari, No. 257 Misc., O.T. 1967; *Iran National Airlines Corp.* v. *United States*, 360 F. 2d 640, 642 (Ct. Cl.); *Withers* v. *United States*, 69 Ct. Cl. 584, 587-88. The requirement of 28 U.S.C. 2501 that "an officer of the United States" settle his ac-

count with the General Accounting Office refers to appointees under Article II, Section 2, of the United States Constitution (compare *United States* v. *Germaine*, 99 U.S. 508) and petitioner does not claim to be such an officer.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

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